Supreme Court, U.S.
FILED

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No.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1996

THOMAS W. HILL,

Petitioner,

v.

DEPARTMENT OF AIR FORCE, MERIT SYSTEMS PROTECTION BOARD, PAUL S. BRITT, and PAUL J. VALLERIE,

Respondents.

Petition for Extraordinary Writ, and in the Alternative, Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR EXTRAORDINARY WRIT, AND IN THE ALTERNATIVE, PETITION FOR WRIT OF CERTIORARI

THOMAS W. HILL,
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36 pp

QUESTIONS PRESENTED FOR REVIEW

1. An extraordinary writ should be issued requiring the United States District Court to enter findings *de novo* regarding federal employee claims of age discrimination, rather than deferring to the Court of Appeals for the Federal Circuit for adjudication of merit of claim contained in administrative record and barring review by the District Court in favor of Federal Circuit review of the administrative record.

2. In the alternative, certiorari should be granted to resolve the conflict between the Tenth Circuit and other circuits which have considered the matter of whether deference should be afforded to adverse decisions of the Federal Circuit regarding appeals of decisions of the Merit Systems Protection Board ("MSPB") which involve claims of discrimination.

3. Certiorari should be granted to resolve the conflict between the Tenth Circuit and other circuits regarding the extent to which provisions of the Civil Service Reform Act are to be construed as barring complaints of federal employees filed under provisions of the Privacy Act, especially in instances where the District Court has found that the agency maintained improper security clearance records willfully designed to inflict damages and has further found that agency refusal to adjudicate the file is in violation of the requirements of its own controlling regulation.

4. With regard to the issue of individual versus agency liability addressed by recently-enacted legislation, *i.e.*, the Federal Employees Liability Reform and Tort Compensation Act of 1988 and the Whistleblower Protection Act of 1989, certiorari should be granted to clarify the extent of liability for deliberate violation of constitutional rights of federal employee which the District Court specifically found to be "something other than 'personnel actions' within the purview of any statutory scheme".

PARTIES TO THE PROCEEDING

Petitioner, Thomas W. Hill, a space systems analyst holding a doctorate degree in physics, was continuously employed by Defendant Air Force as a general schedule ("GS") employee at various locations from January 1966 to July 1985. At the time suit was initiated in November 1985 Hill resided in Albuquerque, New Mexico; he now resides in San Pedro, California. Hill was the Plaintiff in the lower court proceedings of this case and was the Appellant before the Tenth Circuit Court of Appeals in Appeal No. 95-2017.

Respondent Department of the Air Force is an agency of the executive branch of the federal government. The Air Force was the Defendant in the lower court action and has been represented by the United States Attorney throughout the proceedings. As an Appellant, the agency has filed three interlocutory appeals with the Tenth Circuit, prevailing on all counts. The agency was the Appellee in Tenth Circuit Appeal No. 95-2017.

The Merit Systems Protection Board ("MSPB") is a quasi-judicial agency of the executive branch of the federal government, created pursuant to the provisions of the Civil Service Reform Act of 1978. Under leave granted by the District Court in January 1986, the MSPB was added as a Defendant in the lower court action. Following refusal by the Federal Circuit to transfer record review to the District Court, the District Court released the MSPB as a Defendant.

Respondents Paul S. Britt and Paul J. Vallerie were officers in the Air Force and were supervisory officials above Plaintiff prior to the time suit was filed. Britt was an Appellant in two of the above-referenced interlocutory appeals. Both Respondents were Appellees in Tenth Circuit Appeal No. 95-2017, and both are represented by the United States Attorney.

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THOMAS W. HILL,

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DEPARTMENT OF AIR FORCE, MERIT SYSTEMS PROTECTION BOARD, PAUL S. BRITT, and PAUL J. VALLERIE,

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Petition for Extraordinary Writ, and in the Alternative, Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR EXTRAORDINARY WRIT, AND IN THE ALTERNATIVE, WRIT OF CERTIORARI

OPINIONS BELOW

In an unpublished order dated October 20, 1995, the Tenth Circuit Court of Appeals entered its opinion in this matter, affirming the final judgment of the District Court. Hill's petition for rehearing was denied on December 14, 1995 (Appendix D).

STATEMENT OF JURISDICTION

Under the jurisdiction afforded by 28 U.S.C. § 1651(a), Petitioner seeks an Extraordinary Writ directed to the United States District Court for the District of New Mexico, vacating a summary disposition Order (Appendix B) and requiring the District Court to enter findings *de novo* regarding claims of age discrimination in Petitioner's firing by the Air Force and the removal of his name from the list of candidates for a hiring action at the Air Force Space Division.

In the alternative, Petitioner seeks review of the opinion of the United States Court of Appeals for the Tenth Circuit and its judgment entered on October 20, 1995 (Appendix C), for which rehearing was denied on December 14, 1995 (Appendix D). The judgment affirmed the District Court's grant of summary disposition of claims alleged under the provisions of the Privacy Act and the Age Discrimination in Employment Act. Petitioner invokes the certiorari jurisdiction conferred on the Supreme Court by 28 U.S.C. § 1254(1).

STATUTES INVOKED

5 U.S.C. § 7702 provides, in pertinent part,

"(a)(1) Notwithstanding any other provision of law, and except as provided in paragraph (2) of this subsection, in the case of any employee or applicant for employment who –

> "(A) has been affected by an action which the employee or applicant may appeal to the Merit Systems Protection Board, and
>
> "(B) alleges that a basis for the action was discrimination prohibited by – ...

"(iv) sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631,633a), ...

the Board shall, within 120 days of the filing of the appeal, decide both the issue of discrimination and the appealable action in accordance with the Board's appellate procedures under section 7701 of this title and this section. ...

"(e)(1) Notwithstanding any other provision of law, if at any time after -- ...

"(B) the 120th day following the filing of an appeal with the Board under subsection (a)(1) of this section, there is no judicially reviewable action (unless such action is not the result of the filing of a petition by the employee under subsection (b)(1) of this section), ...

an employee shall be entitled to file a civil action to the same extent and in the same manner as provided in ... section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)) ...

"(3) Nothing in this section shall be construed to affect the right to trial de novo under any provision of law described in subsection (a)(1) of this section after a judicially reviewable action, including the decision of an agency under subsection (a)(2) of this section."

5 U.S.C. § 552a(g) provides, in pertinent part,

"(g)(1) CIVIL REMEDIES. -- whenever any agency ...

"(C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; ...

the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection. ...

"(4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of –

"(A) actual damages sustained by the individual as a result of the refusal or failure ..."

STATEMENT OF THE CASE

Petitioner Hill is a former civil servant with a 20-year career distinguished by awards, commendations and outstanding performance ratings, who in separate actions was fired and suffered revocation of his security clearance as the direct result of steps taken by Paul S. Britt, the object of Hill's whistle-blowing. Britt stated that his actions were based on Hill's use of government telephones to make personal calls over a six-month period, which he claimed to be worth about $135.

Hill appealed the actions to the Merit Systems Protection Board ("MSPB"), which refused to consider the security suspension in any manner and upheld the firing despite clear indication of pretext. The MSPB also disallowed Hill's claim of age discrimination immediately after the filing of the appeal and before Hill had an opportunity to discover evidence that Britt sought to use the vacancy created by the firing to promote a favored younger employee named Robert Blankert. The MSPB presiding official later refused to reconsider the initial ruling or to defer to any discrimination authority during the appeal process.

In support of the security suspension, Britt generated a special security file ("SSF") which was maintained by agency officials under Hill's name and social security number, wherein Britt claimed that Hill was "amoral" and a "thief".[1] As a result of Britt's actions agency officials placed a "Z-code" by Hill's name in the agency's central computer, indicating the presence of derogatory information regarding suitability to hold a security clearance. The Z-code is disseminated throughout the defense industry.

By letter to Britt's superior, the Commander of Air Force Contract Management Division ("AFCMD"), Hill appealed Britt's security action and demanded the destruction of the SSF. Major General Bernard L. Weiss, the Commander, investigated the matter and wrote a letter[2] stating that the acts attributed to Hill did not have adverse security significance, that Hill's security record was unblemished, and that Britt's security action against Hill was unwarranted. However, agency officials refused to act on General Weiss' findings or to adjudicate or destroy the SSF. Hill was never afforded any type of hearing on the security matter notwithstanding requirements of the agency's own regulation that hearing must be had and that the SSF must be adjudicated even though the subject has left the employ of the agency.

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[1] Britt was present throughout the MSPB hearing, and was fully aware that Hill was not charged with theft. In response to Hill's defense that the agency had not shown any intent of theft, the agency denied that he was charged with that offense, and the MSPB hearing official stated,

> "Appellant has alleged that the agency failed to prove all the elements of theft. I find that the argument is irrelevant because appellant is not charged with theft; instead appellant is charged with conversion. The agency does not need to prove the criminal elements of theft."

[2] Agency officials refused to release General Weiss' letter until Ordered to do so by the District Court.

On 7 November 1985 Hill filed complaint in the United States District Court for the District of New Mexico (Civil No. 85-1485), invoking jurisdiction under the Privacy Act of 1974, As Amended, the Freedom of Information Act, and the Constitution of the United States, and demanding *inter alia* (1) an order requiring the agency to comply with the provisions of its controlling security regulation and (2) award of damages. When 120 days had expired without a judicially-reviewable decision having been provided by the MSPB, Hill amended the complaint on 29 November 1985 to include an age discrimination cause against the Air Force under provisions of 5 U.S.C. § 7702(e)(1) and 29 U.S.C. §§ 631, 633a. Hill sought *de novo* review of the firing action as well as the arbitrary removal of his name from the list of well-qualified candidates for a hiring action at the Air Force Space Division. Following the entry of a decision by the MSPB, Hill moved the Court for leave to amend to include the MSPB as a Defendant, pursuant to provisions of 5 U.S.C. § 7703. Leave was granted, and on 27 January 1986 Hill filed the operative second amended complaint, restructuring his causes and demanding damages under provisions of the Privacy Act.

Following a hearing conducted in June 1986, the District Court found (Appendix A) above-stated facts regarding the security clearance matter, hearing testimony that Britt had boasted that the indefinite suspension of Hill's clearance would foreclose Hill's future employment in the defense industry. The Court enjoined the agency to reinstate Hill's clearance and to remove the Z-code by his name in its security computer files.

At the time that he moved the Court for leave to amend to add the MSPB as a Defendant, Hill appealed the adverse MSPB ruling to the Court of Appeals for the Federal Circuit. Although the District Court granted leave to amend to add the MSPB as a Defendant and to include review of the MSPB record, the

Federal Circuit subsequently denied Hill's motion to transfer. Without addressing Hill's evidence, the Federal Circuit held[3] that Hill's claim before the MSPB was "frivolous" and later affirmed the MSPB decision with a terse unpublished judgment, despite Hill's submission of District Court findings entered in June 1986.

Upon agency appeal of the injunction, the Tenth Circuit remanded for jurisdiction clarification, and following the Supreme Court decision in *Dept. of Navy v. Egan*, 108 S.Ct. 818 (1988), reversed.[4] The Tenth Circuit held that the District Court lacked jurisdiction under due process, but declined to consider Hill's argument that the issue turned on provisions of the Age Discrimination in Employment Act ("ADEA") and the Privacy Act. The Court acknowledged that the courts have jurisdiction to order an agency to follow regulatory procedures, but anomalously held that the District Court had not found violation of such procedure.

In September 1987 the District Court entered dispositive Orders regarding Hill's Privacy Act, ADEA, and constitutional tort claims. In one memorandum opinion the Court declined to dismiss the Privacy Act cause, holding that Hill had raised a triable issue of damages. In another, the Court reluctantly dismissed the age discrimination claim, indicating that it was obligated to defer to the Federal Circuit decision. Hill appealed the dismissal and moved to include ADEA and Privacy Act issues in the pending security clearance appeal. The Tenth Circuit denied the motion and dismissed Hill's appeal as premature.

In denying Defendants' motion to dismiss a constitutional tort claim in 1987, the District Court held that Britt's "Gestapo-type

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[3] *Hill v. Dept. of Air Force*, 796 F.2d 1469 (Fed.Cir. 1986).

[4] *Hill v. Dept. of Air Force*, 844 F.2d 1407 (10th Cir. 1988), *cert. denied*, 488 U.S. 825 (1988).

tactics involving illegal surveillance and unwarranted takings" directed at Hill were "something other than 'personnel actions' within the purview of any statutory scheme". About a year later Defendants renewed their motion to dismiss Britt, and following denial by the District Court proceeded with a second interlocutory appeal. The Tenth Circuit assumed jurisdiction over Hill's protests, and again reversed.[5] The Court acknowledged that Britt's actions were not personnel actions, but effectively granted him absolute immunity because of his supervisory position.

The District Court took no further substantive action in the suit until the fall of 1992 when it set jury trial of Privacy Act damages for December 1992. In response to a motion by the Defendants, the Court vacated the trial and set oral argument on Defendants' renewed motion to dismiss. In January 1993 the Court granted the Defendants' motion and dismissed all trial issues. Appendix B. Although the Court did not state the basis for dismissal in its Order, the Defendants cited *Henderson v. Social Sec. Admin.*, 908 F.2d 559 (10th Cir. 1990), in support of their argument that construction of the Civil Service Reform Act ("CSRA") serves to bar statutory rights of federal employees under the provisions of the Privacy Act. Hill filed a Rule 59 motion which was denied without comment in November 1994.

Hill appealed the final judgment and petitioned the Tenth Circuit to issue a writ directing the District Court to enter its own findings in the discrimination matter. In October 1995 the Circuit Court denied the petition and dismissed the appeal without hearing oral argument, affirming the discrimination dismissal "for

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[5] *Hill v. Dept. of Air Force*, 884 F.2d 1318 (10th Cir. 1989), *cert. denied*, 495 U.S. 947 (1990). The Tenth Circuit also allowed a third interlocutory appeal filed on Britt's behalf regarding a minor order, and reversed the District Court a third time.

substantially the reasons stated by the district court."[6] Appendix C. The Court characterized matters involved in Britt's manipulation of the SSF,[7] which Hill complained of under provision of the Privacy Act, as "prohibited personnel practices, 5 U.S.C. § 2302".[8] Hill petitioned for rehearing, but the petition was denied on December 14, 1995.

REASONS FOR GRANTING A WRIT

I. A Writ Should Be Issued Requiring The District Court To Enter *De Novo* Discrimination Findings.

The Supreme Court has repeatedly held that the controlling statute compels the district courts to provide *de novo* review following administrative determination of discrimination claims and that such review must be provided to federal employees as

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[6] The District Court, as affirmed by the Tenth Circuit, held that the Federal Circuit had provided Hill *de novo* review of whether he had made a prima facie showing before the MSPB. However, this is not the standard specified at 5 U.S.C. §§ 7702(e)(3). Furthermore, the Federal Circuit has held in *Brewer v. U.S. Postal Service*, 647 F.2d 1093, 1096 (Fed.Cir. 1981), *cert. denied*, 454 U.S. 1141 (1982),

> "In determining whether the Board's decision is supported by substantial evidence, the standard is **not** what the Court would believe on a *de novo* appraisal ..."

[7] In a footnote the Tenth Circuit panel stated that Hill did not appeal dismissal of his records amendment cause. The Notice of Appeal and Hill's main brief oppose this conclusion.

[8] The District Court also labeled the arbitrary removal of Hill's name from a list of eligible candidates for a position at Air Force Space Division and the use of that position to promote a "less senior" employee as a "prohibited personnel practice under 5 U.S.C. § 2302".

well as other complainants. See, *Chandler v. Roudebush*, 425 U.S. 840 (1976) (overruling a plurality of circuit courts); also, *Astoria F.S. & L. Ass'n. v. Solimino*, 501 U.S. ____, 115 L.Ed.2d 96, 107 (1991), holding,

> "Administrative findings with respect to the age discrimination claims of federal employees enjoy no preclusive effect in subsequent judicial litigation ..."

However, the District Court has concluded that Hill's legal right to *de novo* review is precluded on the basis of the MSPB determination in August 1985 that Hill's age discrimination claim was "frivolous". The District Court stated that the question of whether Hill's case was "mixed" was "a close one", holding,

> "Had the appeal been lodged originally in this Court, it is not inconceivable that the Court would have considered it a 'mixed case' and proceeded with review accordingly, including *de novo* review of Plaintiff's allegations of age discrimination. However, the Court is faced with the *fait accompli* that the Federal Circuit has already reviewed and affirmed the matter on the merit..."

> "The Court is not totally comfortable with the Federal Circuit's decision to assume exclusive jurisdiction over the appeal..."

Clearly, the Tenth Circuit opinion, sanctioning the District Court decision to bar Hill's claim of age discrimination on the basis of the results of an administrative decision, has so far departed from the requirements of the law as decided by the Supreme Court in *Chandler* and *Astoria* as to call for the exercise of the supervisory power of the Court.

Of additional importance is the fact that limiting the discrimination review to the MSPB administrative record as it stood in August 1985 foreclosed Hill's right to consideration of facts which were not available until that record had been closed. Specifically, Hill was able to show by affidavit executed by John Gowan, Deputy Director of AFCMD/SA, that the agency waited until the transfer motion had been denied to fill Hill's position by promoting a younger employee named Robert Blankert.

II. Certiorari Should Be Granted To Resolve The Conflict Between The Tenth Circuit And Other Circuits Regarding Deference To Federal Circuit Discrimination Decisions.

Other circuits which have considered Federal Circuit decisions involving discrimination have concluded that preclusive effect cannot be afforded to such decisions. See, *Kean v. Stone*, 926 F.2d 276 (3rd Cir. 1991), refusing to defer an attorney fee issue in a discrimination case before the MSPB (wherein the appellant had prevailed) to the jurisdiction of the Federal Circuit, and noting the anomaly of the Federal Circuit decision (*Kean*, p. 285 n.6; p. 286 n.7). See also, *Cohen v. Austin*, 833 F.Supp. 512, 516 (E.D.Pa. 1993), discussing the Federal Circuit decision in Hill's case at length and holding,

> "We note that *Hill* [*v. Dept. of Air Force*, 796 F.2d 1469 (Fed.Cir. 1986)] is not binding on this Court, as it is a Federal Circuit decision."

In the case of *Miller v. Dept. of Air Force*, 39 EPD ¶ 36,006 (D. Mass. 1985), the agency pled *res judicata* based on adverse results of a Federal Circuit decision and a showing that Miller had not raised a proper discrimination claim before the MSPB. The Massachusetts District Court denied the agency's motion to dismiss, holding,

> "Plaintiff argues that the Federal Circuit decision of December 17, 1984, cannot be given *res judicata* effect because the Federal Circuit would not have had jurisdiction over Miller's discrimination claim if he had raised it there. That is correct. *Chang v. MSPB*, 677 F.2d 173 (1st Cir. 1982) (per curiam)... [D]efendant wants this Court to give preclusive effect to the MSPB decision. That can not be done because federal employees, after administrative adjudication, are entitled to a *de novo* trial in the district court of their discrimination claims. *Chandler v. Roudebush* [11 EPD ¶10,957], 425 U.S. 840 (1974). Even if the MSPB had decided the discrimination issue, that decision would not preclude district court review..."

Moreover, the Congressional Record shows that Congress did not intend that the Federal Circuit review discrimination claims. Congressional Record, Senate Report No. 969, 95th Cong., 2d Sess., reprinted in [1978] U.S. Code Cong.& Ad. News, at 2785,

> "To encourage uniformity in judicial decisions in this area both kinds of cases should continue to be considered by the U.S. District Court."

III. Certiorari Should Be Granted To Resolve The Conflict Between The Tenth Circuit And The District of Columbia Circuit Regarding Statutory Rights Of Federal Employees Under The Privacy Act.

Strang v. U.S. Arms Control & Disarmament Agency ("ACDA"), 864 F.2d 859 (D.C.Cir. 1989), post-dates the decisions in *Hill*, 844 F.2d 1407, and *Egan, supra*, and is in

conflict with the Tenth Circuit holding.[9] Underlying *Strang* is the indisputable position that records used to determine an employee's suitability for a security clearance are subject to the standard of "accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual" mandated by the Privacy Act. *Id.*, 864-868,

> "The Privacy Act requires that a court consider de novo an agency's refusal to amend its records. 5 U.S.C. § 552a(g)(2)(A). The lack of evidence before the district court supporting ACDA's conclusion that some information was uncleared and the Court's Memorandum Opinion make it evident that the court failed to consider this matter de novo ..."

The D.C. Circuit disallowed Strang's claim for damages under sections (g)(1)(C) and (g)(4) of the Privacy Act since Strang was unable to show "that the ACDA's determination to suspend her and revoke her codeword clearance was caused by its intentional or willful failure to maintain accurate records". *Id.*, at 867. Instead, the district court had found that the ACDA had believed that its actions were lawful, and the records for which accuracy was in question and formed the basis for remand to the district court "played no part in ... revocation of her codeword clearance." *Id.* This stands in contrast to Hill's case[10] where (1)

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[9] *Strang* addresses statutory rights of employees regarding security clearance records vis-a-vis the Privacy Act, whereas the Tenth Circuit decision in *Hill, supra*, is limited to construction of constitutional rights.

[10] On 30 June 1985, after seeing the record created by Britt and filed under Hill's name and social security number which would form the basis of the SSF, Hill demanded in writing that the agency amend the file. See ¶ 3 of Ex. "6" of the Second Amended Complaint, "I respectfully request that the file be destroyed as provided by the regulation." The agency never acted on the request.

he never had any type of security violations, (2) Britt's maliciously generated record formed the sole basis for the action, and (3) the Court found agency actions to be intentional

Noticeably absent from *Strang* is a holding that construction vis-a-vis the CSRA foreclosed Strang's rights under the Privacy Act, even though Strang was suspended from her job. Furthermore, the damages which occurred to Hill as a result of agency refusal to adjudicate the referenced SSF occurred more than eight months after he had left the agency. The record shows that Hill received two offers employment in February 1986 which were withdrawn when the agency disseminated the Z-code to the prospective employers.

The construction of the CSRA to preclude Privacy Act (and ADEA) claims is opposed by federal law. See, 5 U.S.C.A. § 1222 (Supp. 1990), codifying in part the (retroactive) Whistleblower Protection Act of 1989,

> "Except as provided in Section 1221(i), nothing in this chapter or chapter 23 shall be construed to limit any right or remedy available under a provision of statute which is outside of both this chapter and chapter 23."

IV. The Public Interest Is Not Served By The Shield Of Absolute Immunity Which Has Been Afforded To Minor Federal Employees Who Knew That Their Actions Violated Another's Constitutional Rights.

Since the time of the District Court ruling on Hill's constitutional causes, including a Federal Tort Claims Act ("FTCA") cause, federal law has changed significantly with regard to claims which may be pursued under the FTCA. The

Federal Employees Liability Reform and Tort Compensation Act of 1988 allows persons injured by common law torts committed by federal employees to sue for damages under the FTCA. The Whistleblower Protection Act of 1989 at 5 U.S.C. § 1214(a) through (h), creates an individual right of action..[11]

In the fifth cause of the complaint Hill specifically alleged that the defamation he endured violates "provisions of *the New Mexico Statutes*" and that he has suffered damage including "injury to reputation, mental anguish, impairment of earning ability, and loss of income". Materials obtained during discovery showed that Arthur L. Staden and Eric B. Nelson, who had no part in the firing action, had with assistance from David W. Hickman circulated various memoranda throughout the Air Force claiming that Hill had been fired because of "fraud and stealing". Following the issuance of the Court's findings (Appendix A), Hill moved for leave to amend to name Hickman as a Defendant, but his motion was denied.

The lower court actions have left Hill with a "Hobson's choice" -- he has not been permitted to pursue relief either against the agency or against the individuals who clearly knew that their actions violated Hill's constitutional rights. Since both of the referenced measures were passed while Hill's suit was pending and since both contain retroactive provisions, such a position is no longer viable, and clarification by the Supreme Court is appropriate.

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[11] Prior to the firing Hill filed a petition with the Office of the Special Counsel for an order staying the adverse action under a finding of the probable occurrence of a prohibited personnel practice. At the 13 June 1986 hearing, James H. Suttle testified that the investigator had recommended a stay of the firing but was overruled by then-Counsel O'Connor.

CONCLUSION

In summary, Hill should be afforded either (1) mandamus action enforcing previous, dispositive decisions of the Supreme Court regarding right to de novo review of age discrimination in the District Court, or (2) Supreme Court resolution, upon a grant of certiorari, of the conflict between the circuit courts regarding deference to the Federal Circuit in matters of discrimination. In addition, the Supreme Court should resolve the conflict between the circuits with regard to the extent to which the CSRA may serve as a bar to federal employee actions filed under the Privacy Act. Lastly, Hill pleads for review of the propriety of his constitutional claims against the background of the referenced remedial legislation, and for such other and further relief as may be deemed appropriate by the Court.

Respectfully submitted,

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APPENDIX A - FINDINGS OF FACT ENTERED BY THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO, FOLLOWING JUNE 1986 HEARING. FILED SEPTEMBER 18, 1986.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civil No. 85-1485-JB

THOMAS W. HILL,
Plaintiff,

v.

DEPARTMENT OF AIR FORCE,
PAUL S. BRITT, and
PAUL J. VALLERIE,
Defendants.

COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS MATTER having come on for a hearing on June 13 and 16, 1986, and the Court having adduced evidence, makes the following findings of fact and conclusions of law.

Findings of Fact

1. This matter comes before the Court on Plaintiff's motion for injunction wherein he seeks reinstatement of his security

clearance which was revoked on or about May 24, 1985; that on that date Plaintiff had a TOP SECRET clearance with access to Sensitive Compartmentalized Information.

2. Prior to Plaintiff's removal from Federal service on July 5, 1985, Plaintiff was a Federal civil servant employed by Defendant at the GS-13 and GS-14 grade levels and assigned, from July 1973 to July 1985, to the Directorate of Aerospace Studies at Kirtland Air Force Base, New Mexico, (AFCMD/SA).

3. During almost twenty years of his employment, Plaintiff was cleared for access to classified materials, the most recent level being TOP SECRET Sensitive Compartmentalized Information.

4. At the time of the revocation of his security clearance, Plaintiff was under the direct supervision of Colonel Paul Britt, the Director of AFCMD/SA.

5. The tensions between Plaintiff and Colonel Britt resulted from accusations of Colonel Britt that Plaintiff had made personal telephone calls at government expense on the Directorate's AUTOVAN telephone system; that Plaintiff responded to the allegations by accusing Colonel Britt of abusing TDY funds to pursue personal interests that, thereafter, Colonel Britt brought formal charges against Plaintiff for the unauthorized calls and, further, accused Plaintiff of theft for Plaintiff's removal of personal notes abandoned by a previous Directorate employee.

6. Major John Gowan, the Deputy Director of AFCMD /SA, upon being assigned to the unit, heard rumors and references regarding Plaintiff which he deemed to be unprofessional: that the Technical Director of AFCMD/SA referred to Dr. Hill as

"Dr. Moriarty"; that Plaintiff had been singled out for adverse and disparate treatment.

7. Major John Gowan gave special attention to Plaintiff because of the way management responded to Plaintiff; that he attempted to intercede between Plaintiff and Colonel Britt in order to resolve the problems in the Directorate; that Plaintiff at all times acted professionally and made reasonable professional attempts to reconcile all differences; that Colonel Britt was unresponsive and negative in manner; that Colonel Britt was not objective and made numerous statements reflecting a vindictive attitude; that Colonel Britt used any opportunity to place Plaintiff in an unfavorable light.

8. James H. Suttle, previously a 14-year civil servant, grade GS-14, with Aerospace Studies had known Colonel Britt since 1965 and had known Plaintiff since 1972-73; that he considered Colonel Britt a friend as well as a boss.

9. Mr. Suttle played the role of a mediator in order to diffuse tensions between Colonel Britt and Plaintiff but with no success; that he characterized Colonel Britt's management technique as that of a "threat type"; that this management style always had a "whipping boy"; and that Plaintiff was the brunt of Colonel Britt's technique.

10. Mr. Suttle testified that security clearances were used in a way to influence behavior during Colonel Britt's tenure and that of his predecessor; that disparate treatment was common regarding sanctions imposed for security violations.

11. In acting as a mediator, Mr. Suttle informed Colonel Britt that Plaintiff would drop certain grievances which he had in an effort to mediate differences so that he could go on with his

assigned duties; that this offer was refused; that Colonel Britt considered Plaintiff's grievances as a threat to Britt's authority and that Colonel Britt set out to "get him [Plaintiff]"; that Colonel Britt carried out a vendetta; and that Colonel Britt became obsessed with the "Hill problem."

12. As Major Gowan sought to act as an arbiter between Colonel Britt and Plaintiff, Colonel Britt became more alienated and informed Major Gowan that his actions in support of Hill were inappropriate; that, thereupon, Major Gowan requested to be transferred and he was subsequently transferred to the Emergency Directorate of CMD; that thereafter Colonel Britt sought means to have Major Gowan court-martialed for his having sided with Plaintiff.

13. Prior to his disaffection with Major Gowan because of his support of Plaintiff, Colonel Britt rated Major Gowan in the highest category possible in his officer effectiveness report of June 1985.

14. According to Major Gowan, Colonel Britt wanted Plaintiff out of the Air Force and "erased from memory"; that he referred to Plaintiff as a "non-person" and stated that he would do anything to "get Plaintiff"; that the removal of Plaintiff's security clearance was a means to "eradicate" Plaintiff.

15. In retaliation for Plaintiff's charges Colonel Britt revoked Plaintiff's security clearance on May 24, 1985, asserting that the revocation was in the interest of national security and alleging that Plaintiff had acted dishonestly; established a pattern of poor judgment and unreliable behavior and was untrustworthy; that, further, Colonel Britt established a special security file on Plaintiff; that Plaintiff was not given any opportunity to answer the allegations or otherwise contest the revocation.

16. Colonel Britt's actions were also motivated by Plaintiff's having filed suit against the agency in June 1984 and of his having filed grievances in the past.

17. On June 10, 1985, as a consequence of Colonel Britt's actions, the Air Force Security Clearance Office (AFSCO) placed a "pending adjudication" code by Plaintiff's name in its computer file and made that data available to all Department of Defense users; that the coded entry has prevented Plaintiff's access to classified materials until such time as the special security file on Plaintiff has been adjudicated; that as a consequence of Plaintiff's termination from Federal service the AFSCO has refused to adjudicate the file.

18. On July 31, 1985, AFSCO entered a "Z code" by Plaintiff's name in the AFSCO computer file; that the "Z code" indicates that Plaintiff has left the employ of the agency and that the agency possesses derogatory data regarding Plaintiff's suitability for a security clearance; that the "Z code" has damaged Plaintiff and precluded his employment in the defense community although Plaintiff's capabilities are in demand.

19. In a conversation with Mr. Suttle in Washington, D.C., Colonel Britt knew that Plaintiff was seeking other employment and acknowledged that the revocation of Plaintiff's security clearance would prevent Plaintiff from obtaining employment.

20. Mr. Suttle testified in favor of Plaintiff before the Merit Board, and as a consequence the Air Force retaliated against Suttle.

21. John Gowan, the Deputy Director of AFCMD/SA, and Mr. James H. Suttle, testified unequivocally that Plaintiff was not a security risk.

22. In reviewing Colonel Britt's actions in revoking Plaintiff's security clearance and questioning his eligibility, General Bernard L. Weiss, Commander of the Air Force Contract Management Division, made the following findings:

a. That the acts attributed to Plaintiff did not have adverse security significance.

b. That the facts of Plaintiff's case did not indicate that Plaintiff was a threat to national security.

c. That Plaintiff's security record during 20 years of service was unblemished and the withdrawal of Plaintiff's security clearance was unwarranted.

23. John W. Dettmer, Director of Strategic Defense Force, and prior director of the Technical Office in the Weapons Laboratory, testified of Plaintiff's excellent reputation and that Plaintiff was not a security risk.

24. In his performance evaluation by Lt. Colonel Paul J. Vallerie, Director of Aerospace Studies for the years 1982 and 1983, Plaintiff was rated as excelling in safeguarding classified information and following established security procedures.

25. According to the Department of Defense Personnel Security program, revocation of a security clearance for access to classified information is deemed to be an adverse action. Defendants' Exhibit F, p. 59, para. 8-lOO(a).

26. Pursuant to the Personnel Security program; Defendants are required to adjudicate all special security files

regardless of any other adverse action taken including separation. Defendants' Exhibit F, p. 60, para. 102(e)(2).

27. The actions of Colonel Britt with the assistance of Captain David W. Hickman, the Staff Judge Advocate, as reflected in the evidence, lead the Court to conclude that the revocation of Plaintiff's security clearance was not because of any adverse security significance but, rather, motivated solely by a deliberate intention to prevent Plaintiff from obtaining employment with civilian agencies who deal in the defense industry where security clearances are essential.

28. The Department of Air Force has failed to establish a rational nexus between the adverse action taken and the articulated reasons for the action.

29. Plaintiff's work opportunities have been severely limited by a fact determination which failed to comport with the traditional ideas of fair procedure; and that Defendants have failed to observe even the most minimal due process procedures in revoking Plaintiff's security clearance.

Conclusions of Law

1. The Court has jurisdiction of the subject matter of, and the parties to, this action.

2. Plaintiff will be irreparably harmed if a preliminary injunction is not granted.

3. Plaintiff has made a prima facie case showing a reasonable probability that he will ultimately prevail on the merits.

4. The threatened injury to Plaintiff outweighs whatever damage the proposed preliminary injunction may cause Defendants.

5. The preliminary injunction, if issued, will not be adverse to the public interest.

6. A preliminary injunction should be issued enjoining the Department of Air Force to reinstate Plaintiff's security clearance to the level held prior to May 24, 1985; and, further, that the Department of Air Force should be enjoined to remove the "Z code" by Plaintiff's name in the AFSCO computer file and that the computer records should be programmed to indicate that Plaintiff is entitled to access to classified material consistent with the security clearance held prior to May 24, 1985; that the Department of Air Force notify all inquiring agencies of the reinstatement of Plaintiff's security clearance without derogatory information.

s/ Juan G. Burciaga
Juan G. Burciaga
United States District Judge

APPENDIX B - SUMMARY JUDGMENT ORDER ENTERED BY THE DISTRICT COURT. FILED JANUARY 11, 1993.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civil No. 85-1485-JB

THOMAS W. HILL,

Plaintiff,

v.

DEPARTMENT OF AIR FORCE,

Defendant.

ORDER

THIS MATTER came on for a hearing on January 7, 1993 on Defendant's April 8, 1988 motion to dismiss that portion of Plaintiff's second cause of action which remains after the Court's 4 September 1987 dismissal of a portion of Plaintiff's second cause of action. The Court having heard the arguments of counsel, reviewed the submissions of the parties, and made its findings and conclusions in open Court;

Wherefore,

IT IS ORDERED, ADJUDGED AND DECREED that Defendant's motion to dismiss be, and hereby is, granted.

IT IS FURTHER ORDERED that Plaintiff's December 14, 1992 request (motion) for leave to amend second cause of action to conform with the facts be, and hereby is, denied.

IT IS FURTHER ORDERED that the Court sua sponte grants summary judgment for Plaintiff on his request in Count III of the second amended complaint for copies of Equipment Action Requests (AU Forms 601) for AFCMD /SA for the period of 1 January 1983 to 5 June 1985.

DATED this 8th day of January, 1993.

s/ Juan G. Burciaga
Chief Judge

APPENDIX C - DENIAL OF PETITION FOR A WRIT AND OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.
FILED OCTOBER 20, 1995.

No. 95-2017

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

THOMAS W. HILL,

Plaintiff-Appellant,

v.

UNITED STATES AIR FORCE, PAUL S. BRITT, PAUL J. VALLERIE,

Defendants-Appellees.

ORDER AND JUDGMENT*

Before KELLY, SETH, and HENRY, Circuit Judges

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed.R. App.P. 34(a); 10th Cir. R. 34.1.9. This case is therefore ordered submitted without oral argument.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of the Court's General Order filed November 29, 1993. 151 F.R.D. 470.

Plaintiff appeals from the district court's dismissal of his age discrimination, 29 U.S.C. §§ 631, 633a, and Privacy Act, 5 U.S.C. § 552a, claims brought against defendant United States Air Force and his constitutional claims brought against the individual defendants. The parties are familiar with the lengthy and complex factual and procedural history of this case, commenced in 1985. Therefore, we proceed directly to the issues on appeal.

Plaintiff first argues that the district court erred in refusing to provide him with a de novo trial of his age discrimination claim. The district court dismissed the age discrimination claim for lack of subject matter jurisdiction based on the jurisdictional determination of the Federal Circuit that because plaintiff did not raise a prima facie case of age discrimination within his Merit Systems Protection Board appeal, jurisdiction was properly before the Federal Circuit, *see, Hill v. Department of Air Force*, 796 F.2d 1469, 1471 (Fed.Cir. 1986). Reviewing the district court's dismissal of the age discrimination claim de novo, *see Cizek v. United States*, 953 F.2d 1232, 1233 (10th Cir. 1992) (subject matter jurisdiction), we affirm for substantially the reasons stated by the district court.

Plaintiff next argues that he is entitled to trial of his Privacy Act damages claim [1] and that he should have been permitted to supplement his complaint to include details concerning the extent of the adverse agency actions regarding his security clearance. We agree with the district court's determination that the Privacy Act did not provide the court with jurisdiction to review the alleged prohibited personnel practices, 5 U.S.C. § 2302, because

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[1] Plaintiff does not appeal the district court's dismissal of the portion of the Privacy Act claim seeking amendment of his employment records.

the Civil Service Reform Act of 1978, Pub. L. 95-454, 92 Stat. 1111 (codified in various sections of 5 U.S.C.), provides an exclusive remedial scheme. *See also Henderson v. Social Sec. Admin.*, 908 F.2d 559, 560 (10th Cir. 1990). We also affirm the dismissal of this claim and conclude the district court did not err in failing to permit amendment of the complaint.

Plaintiff's final argument is that he is entitled to "some relief" under the constitutional claims against the defendants. Plaintiff concedes that this court already has decided his claim against defendant Britt. *See Hill v. Department of Air Force*, 884 F.2d 1318 (10th Cir. 1989), *cert. denied*, 495 U.S. 947 (1990). Thus, the law of the case doctrine applies to preclude further consideration of that claim. *See Rohrbaugh v. Celotex Corp.*, 53 F.3d 1181, 1183 (10th Cir. 1995). We agree with the district court's dismissal of the claim against defendant Vallerie as precluded by a comprehensive statutory scheme. We affirm that claim for substantially the reasons set forth by the district court, as well as for the reasons set forth in *Hill*, 884 F.2d 1318.

The judgment of the United States District Court for the District of New Mexico is AFFIRMED. Plaintiff's petition for a writ seeking an order directing the district court to hold a trial on the age discrimination claim in DENIED. *See Mallard v. United States Dist. Court*, 490 U.S. 296, 309 (1989) (petitioner must prove he lacks alternatives to obtain relief); *see also Weston v. Mann (In re Weston)*, 18 F.3d 860, 864 (10th Cir. 1994) (mandamus is not substitute for appeal). Plaintiff motion for leave to file a replacement reply brief is GRANTED. The mandate shall issue forthwith.

Entered for the Court
Paul J. Kelly, Jr.
Circuit Judge

APPENDIX D - DENIAL OF PETITION FOR RE-HEARING BY THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.
FILED DECEMBER 14, 1995.

No. 95-2017

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

THOMAS W. HILL,

Plaintiff-Appellant,

v.

UNITED STATES AIR FORCE, PAUL S. BRITT, PAUL J. VALLERIE,

Defendants-Appellees.

ORDER

Entered December 14, 1995

Before Kelly, Seth, and Henry, Circuit Judges.

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted

to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court

PATRICK FISHER, Clerk
By: s/ Audrey F. Weigel
Deputy Clerk